IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 286

ALUMINUM COMPANY OF AMERICA, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Aluminum Company of America, by its attorney, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit entered on April 28, 1944, in the case between the above named parties, docketed therein as No. 8302. The said judgment reversed decisions of the United States Board of Tax Appeals (now the Tax Court of the United States), entered on September 16, 1942.

Opinions Below

The findings and opinion of the United States Board of Tax Appeals are officially reported at 47 B.T.A. 543

and are printed in the record (R. 4-26). The opinion of the Circuit Court of Appeals is officially reported at 142 F. (2d) 663 and is printed in the record (R. 49-63).

Jurisdiction

The jurisdiction of this Honorable Court is invoked under United States Code, Title 26, Section 1141(a), and Title 28, Sections 347 and 350.

Statute Involved

The statute involved is Section 3 of the Act of March 27, 1934, c. 95, 48 Stat. 505, 34 U.S.C. §496, commonly known as the "Vinson Act", as amended by Section 3(b) of the Act of June 25, 1936, c. 812, 49 Stat. 1926, 34 U.S.C. §496. These provisions, as originally enacted and as amended, are printed in Appendix A (*infra,* pp. 26-29).

The specific portions of the statute calling for construction read as follows:

> "*Provided,* That no contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—
>
> (a) To make a report, as hereinafter described, under oath, to the Secretary of the Navy upon the completion of the contract.
>
> (b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the

total contract price, such amount to become the property of the United States:

* * * * * * *

(e) To make no subcontract unless the subcontractor agrees to the foregoing conditions.

The report shall be in form prescribed by the Secretary of the Navy and shall state the total contract price, the cost of performing the contract, the net income, and the per centum such net income bears to the contract price."

Statement

Aluminum Company of America, hereinafter referred to as the "petitioner", in the years 1936, 1937 and 1938 completed performance of certain contracts of sale of aluminum materials. Some of these were "prime contracts", which term means "a contract made directly with the Government of the United States and by its terms subject to the Vinson Act" (R. 7). Others were contracts of sale to prime contractors with the Government or to subcontractors or materialmen (R. 9-14); these were by their terms subject to the Vinson Act in so far as applicable (R. 41-47). The materials so sold eventually became parts of Vinson Act naval vessels or aircraft (R. 56).

All of the materials were regular commercial products, representing less than 2 per cent. of the petitioner's total sales of similar materials for the years in question and were identical in character and procedure of sale with those sold to many customers for different purposes (R. 11). All of them (except for certain negligible screw machine products, R. 9-11) required a great deal of further and extensive fabrication

by the petitioner's customers or their vendees resulting in radical distortion in size and shape and conversion into new and different forms (R. 10-15).

For the year 1936 and for the years 1937 and 1938 the Commissioner of Internal Revenue, hereinafter referred to as the "respondent", determined deficiencies in the petitioner's excess profit liability on the several prime contracts and other contracts (R. 4). The petitioner petitioned the Board of Tax Appeals for redetermination of these deficiencies for 1936 (R. 2) and 1937 and 1938 (R. 3). It did not dispute that its prime contracts were by their terms subject to the Vinson Act. The Board held that on the prime contracts there was no deficiency in excess profit liability for 1936 (R. 29) and that there were deficiencies in such liability for each of the years 1937 and 1938 (R. 29).

The petitioner contended before the Board that, in computing profit on all the contracts, both prime contracts and others, the cost of the metal supplied thereunder, which had been produced or acquired by the petitioner at various times, should be its "schedule cost", i. e., the fair market value on the date of its appropriation to the particular contract (Appendix B, *infra*, pp. 39-40); and that, *a fortiori*, the cost of the said metal should be taken to be not less than its fair market value when the Vinson Act was passed, for the reason that the Vinson Act and the regulations promulgated thereunder do not call for retroactive application of its recapture provisions (Appendix B, *infra*, pp. 40-41). The Board held, with respect to the prime contracts, that the cost of metal should be taken to be its original cost to the petitioner (R. 25), and it determined the deficiencies

for 1937 and 1938 accordingly. It did not mention the argument against retroactive application of the statute.

With respect to the other contracts, the Board, sustaining the petitioner, held that it was not liable for excess profit because it was not a "subcontractor" within the meaning of the Act. The respondent petitioned the Circuit Court of Appeals for the Third Circuit for review of this decision. That court reversed the Board upon the ground that the word "subcontractor" in the Vinson Act includes materialmen (R. 58).

With respect to the question of "cost", the petitioner contended before the Circuit Court of Appeals that there is no indication in the Act of an intention to give it retroactive application and therefore that

> "The excess profit on a subcontract for the construction or manufacture of a vessel or aircraft authorized by the Vinson Act does not include profit resulting from an increase in the value of the metal occurring prior to the passage of the Act." (Appendix B, *infra*, p. 41)

The Circuit Court of Appeals held that because the Board had "relevantly decided the question" against the petitioner with respect to the prime contracts and because the petitioner had not petitioned for review of the Board's decisions, this question was not open to the petitioner (R. 62-63).

Questions Presented

1. Where a materialman supplies to a prime contractor materials consisting only of regular commercial products requiring extensive further fabrication, involving radical distortion in their size and shape, and conversion into new and different forms before being made a part of a naval vessel or aircraft, is the materialman subjected to liability as a "subcontractor" within the meaning of the Vinson Act?

2. Where a materialman supplies such materials to other persons who in turn supply them to a prime contractor, a sub-contractor, or another materialman, is the materialman subjected to liability as a "subcontractor" within the meaning of the Vinson Act?

3. Is a regulation subjecting such a materialman to liability as a "subcontractor" under the Vinson Act a valid exercise of authority by the Secretary of the Navy and the Secretary of the Treasury?

4. Where the administrative practice under the regulation has been to treat a materialman as a subcontractor only if he dealt with a prime contractor, may the regulation be applied to a materialman with respect to transactions in which he did not deal with a prime contractor?

5. In a case in which the Board of Tax Appeals has decided that there is no deficiency, is the respondent on review in the Circuit Court of Appeals precluded, by reason of its failure to petition for review, from urging in support of the decision grounds presented to the Board?

6. In a case in which the Board has decided that there is a deficiency, is the respondent on review in the

Circuit Court of Appeals precluded, by reason of its failure to petition for review, from urging in support of the decision grounds presented to the Board?

7. Was the Vinson Act intended by Congress to apply retroactively so as to include in "excess profit" increments in value of the materials occurring prior to the enactment of the statute?

Reasons Relied On for the Allowance of the Writ

I.

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The principal question is whether materialmen were intended by Congress to be subjected to liability for excess profit under the Vinson Act, which imposes such liability on "subcontractors". This question has never been passed on by this Court, or by any federal tribunal in any other case except one decided by the Board of Tax Appeals, which followed its previous decision in the case at bar. The Commissioner did not seek review of that decision.

The Vinson Act was enacted on March 27, 1934, and the profit-limiting provisions of section 3 were suspended by section 401 of the Second Revenue Act of 1940, 54 Stat. 1003, 34 U.S.C. § 496 a, as to contracts and subcontracts completed during the effective period of the excess profits tax. In view of the very large number of concerns that supplied materials which eventually became parts of Vinson Act vessels and aircraft, the question here presented is of national importance and involves large sums of money. Its disposition by this

Court would make much litigation unnecessary and dispose of many cases involving the same question which, as we are informed, are now pending before the Bureau of Internal Revenue and in the Tax Court of the United States.

II.

The decision of the Circuit Court of Appeals held that the Vinson Act, imposing liability with respect to "subcontracts" of "subcontractors", applied to the petitioner's sales, made to prime contractors, subcontractors and materialmen, of regular commercial products requiring extensive further fabrication by the petitioner's customers or their vendees. This holding is in conflict with the decision of this Court under a comparable statute in *Clifford F. MacEvoy Co. v. United States,* 64 S. Ct. 890 (not yet officially reported), holding that a materialman is not a "subcontractor" within the meaning of the Miller Act. It is also in conflict with a great number of other decisions by federal and state appellate courts, which we believe to be unanimous in establishing that a materialman, under the circumstances described, is not to be classed as a "subcontractor".

III.

The decision of the Circuit Court of Appeals sustained a regulation promulgated under the Vinson Act, subjecting materialmen to liabilities that are imposed by the statute only on contractors and subcontractors. It did this in disregard of the explicit admission of the Commissioner of Internal Revenue that the regulation was an "enlargement of the ordinary routine definition" of the term "subcontractor" and his disclosure that under the administrative practice no attempt had been

made to apply the regulation to one not dealing with a prime contractor. The decision, in thus permitting the enlargement of an Act of Congress by administrative action, is contrary to the decisions of this Court in *Maass v. Higgins,* 312 U. S. 443, and *Helvering v. Sabine Transportation Co., Inc.,* 318 U. S. 306. The decision, in sustaining a regulation that was not consistently followed in administrative practice, is contrary to the decision of this Court in *United States v. Pleasants,* 305 U. S. 357, and *Burnet v. Chicago Portrait Co.,* 285 U. S. 1.

IV.

The Circuit Court of Appeals held that the petitioner was, by reason of its failure to petition for review, precluded from urging, in support of the decisions of the Board of Tax Appeals, grounds presented to the Board but not passed upon by it. This holding is important to federal procedure. As to the case for 1936, Docket No. 103,316 in the Board, the decision of the Board was that there was no deficiency (R. 29); the decision of the Circuit Court of Appeals that the petitioner was precluded from urging independent grounds of affirmance by reason of its failure to appeal is contrary to the decision of this Court in *Helvering v. Lerner Stores Co.,* 314 U. S. 463. As to the case for 1937 and 1938, Docket No. 106,514 in the Board, the decision of the Board was that there was a small deficiency for each year (R. 29); the decision of the Circuit Court of Appeals that the petitioner was precluded from urging independent grounds in support of the Board's decision by reason of its failure to appeal is contrary to the decision of this court in *LeTulle v. Scofield,* 308 U. S. 415, where the judgment was in part against the respondent. To that extent the judgment stood, since he had not

sought review. To the extent that it was favorable to him, the judgment was affirmed on grounds rejected by the court below in rendering the judgment in part against him.

V.

The decision of the Circuit Court of Appeals failed to hold that in determining excess profit, the materials used are to be included in the "cost of performing the contract" at their value on the date of enactment of the Vinson Act. The court thus sanctioned retroactive application of the Vinson Act by including in excess profit on the construction of vessels and aircraft increments in value of the materials arising before the Act was passed. This disposition of this federal question is in conflict with decisions of this Court, including *Doyle v. Mitchell Bros. Co.,* 247 U. S. 179; *Lynch v. Turrish,* 247 U. S. 221, and *Hassett v. Welch,* 303 U. S. 303.

Wherefore the petitioner prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit, that the said judgment be reversed, and that such other and further relief be granted as may seem proper.

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Of Counsel.

July 25, 1944.